1992

The State of Utah v. Don W. Dunbar : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff and Appellee, vs. DON W. DUNBAR, Defendant and Appellant.	Case No. 920341-CA Argument Priority Classification: 2

BRIEF OF APPELLEE

Appeal from the First Circuit Court of Cache County, State of Utah, Logan City Department, Hon. Roger S. Dutson.

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for Driving During Suspension, a Class C Misdemeanor, in violation of Utah Code Ann. §41-2-136, by a jury, in the First Circuit Court of Cache County, State of Utah, Logan City Department, the Honorable Roger S. Dutson presiding.

This Court has jurisdiction to hear this appeal, pursuant to Utah Code Ann. §78-2a-3(2)(d) and (f).

STATEMENT OF THE ISSUES PRESENTED AND STANDARD OF APPELLATE REVIEW

In addition to the twelve (12) issues raised in the Brief of Appellant, each of which are addressed herein, Appellee THE STATE OF UTAH claims that the evidence introduced in this case was sufficient to support the Defendant's conviction. The standard of review is as follows: "...[T]he function of a reviewing court is

limited to insuring that there is sufficient competent evidence regarding each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime. ..." State v Warden, 813 P.2d 1146 (Utah 1991), at 1150.

GOVERNING STATUTES AND RULES

Copies of the following statutes and Court Rules cited herein are included in the Addendum to this Brief:

1. Rule 6(b), Utah Rules of Criminal Procedure.
2. Utah Code Ann. §78-4-5.
3. Utah Code Ann. §41-2-136.
4. Utah Code Ann. §41-2-104.
5. Utah Code Ann. §41-2-137.
6. Utah Code Ann. §76-1-402(3).
7. Utah Code Ann. §41-2-122.
8. Utah Code Ann. §41-12a-412.
9. Rule 4(d), Utah Rules of Criminal Procedure.

STATEMENT OF THE CASE

On June 3, 1991, the Defendant was personally served with copies of a Criminal Summons and Information, charging him with the crime of Driving During Suspension, a Class C Misdemeanor, in violation of Utah Code Ann. §41-2-136. The Summons and Information were subsequently filed in the First Circuit Court of Cache County,

Logan City Department. Copies of those pleadings are included in the Addendum to this Brief.

The Defendant failed to appear in response to the Criminal Summons, so a Bench Warrant was issued for his arrest. On January 31, 1992, after having been arrested on that and other unrelated bench warrants, the Defendant was arraigned and the public defender was appointed to represent him.

Defense counsel subsequently filed a Motion to Dismiss, to which the State responded, which was argued before the Court and denied on April 3, 1992. (See Transcript of Motion Hearing, April 3, 1992, hereinafter referred to as "Tr.-3".)

Defense counsel also filed a Motion to Dismiss for Lack of Jurisdiction, to which the State also responded, and which was argued before the Court and denied on April 24, 1992. (See Transcript of Motion Hearing, April 24, 1992, hereinafter referred to as "Tr.-24".)

On May 8, 1992, the case was tried before a jury. At the conclusion of the case, the jury returned a verdict of guilty as charged. (See Transcript of Trial, May 8, 1992, hereinafter referred to as "Tr.-8".) Judgment of conviction was thereupon entered by the Court. This appeal has been taken by the Defendant from that Judgment.

STATEMENT OF FACTS

On May 17, 1991, Officer James Meacham of the Cache County Sheriff's Office, while stopped at the intersection of 300 South Street and Main Street in Logan City, Cache County, State of Utah, noticed the Defendant driving a motorcycle. (Tr.-3, pp. 7-8; Tr.-8, pp. 51-56). Officer Meacham had personal knowledge of the Defendant's identity from previous dealings with him. (Tr.-8, pp. 50-51).

At that time, Officer Meacham was off-duty, in his personal vehicle, and without his customary law enforcement equipment. (Tr.-3, p. 9; Tr.-8, p. 73). Because of his prior dealings with the Defendant, Officer Meacham suspected that the Defendant's driver's license was suspended as of that date. (Tr.-3, pp. 4-5; Tr.-8, pp. 58-61). He thereupon checked on the status of the Defendant's driver's license, and ordered a certified copy of the Defendant's driving record from the Utah Driver's License Division. (Record, hereinafter abbreviated as "R.", pp. 76-84).

After confirming with the Driver's License Division that the Defendant's driver's license was, in fact, suspended on May 17, 1991, Officer Meacham requested that an Information be filed and a Criminal Summons be issued for the charge of Driving During Suspension, a Class C Misdemeanor, in violation of Utah Code Ann.

§41-2-136. (R., pp. 184-186). Copies of the Information and Criminal Summons are included in the Addendum to this Brief. [The procedural history of this case thereafter is set forth in the Statement of the Case, above.]

SUMMARY OF ARGUMENT

1. Viewed in the light most favorable to the jury verdict, the evidence introduced in this case was sufficient to support the Defendant's conviction. State v. Warden, 813 P. 2d 1146 (Utah 1991).

2. Because any delay in this case was caused by Defendant's failure to appear and voluntarily absenting himself from the jurisdiction, he was not denied a speedy trial. State v. Hoyt, 806 P. 2d 204 (Utah App. 1991).

3. Because Defendant was personally served with copies of an Information and Criminal Summons, and never appeared in response thereto, he was not denied equal protection or due process. Rule 6(b), Utah Rules of Criminal Procedure.

4. The trial court properly exercised its jurisdiction in this case, because the crime was completed within Logan City, Cache County, State of Utah. Utah Code Ann. §78-4-5.

5. The method by which the jury panel was initially seated was irrelevant, because each party was afforded full opportunity to exercise its challenges to individual jurors.

6. The trial court took great care to explain to and instruct the jury on the presumption of innocence and the Defendant's right not to testify.

7. No evidence was introduced that the Defendant was driving in River Heights, as previously directed by the trial court.

8. The mere subsequent expiration of the Defendant's driver's license did not change its status from being previously suspended. Utah Code Ann. §41-12a-412.

9. The charge of Driving Without a License was not a lesser-included offense of the original charge of Driving During Suspension. Utah Code Ann. §§41-2-104, 41-2-137, and 76-1-402(3). Therefore, the Defendant was not entitled to a jury instruction to that effect.

10. The mere overhearing of defense counsel's name by a juror during a recess was incidental and inconsequential. Logan City v. Carlsen, 799 P. 2d 224 (Utah App. 1990).

11. The Defendant was properly identified in this case, and offered no evidence in rebuttal.

12. The mere fact that the investigating officer also served as bailiff in a previous motion hearing in this case did not prejudice the Defendant in any way.

13. The trial court properly permitted the State to amend the date of the offense to conform to the evidence. Rule 4(d), Utah Rules of Criminal Procedure.

ARGUMENT

POINT I: THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION.

In State v Warden, 813 P. 2d 1146 (Utah 1991), the Utah Supreme Court set forth the standard of review of sufficiency of the evidence, as follows:

> The proper standard of review for appeals concerning the sufficiency of evidence is well established. In making the determination as to whether there is sufficient evidence to uphold a conviction, an appellate court does not sit as a second fact finder. It is not the function of a reviewing court to determine guilt or innocence or judge the credibility of witnesses. The mere existence of conflicting evidence, therefore, does not warrant reversal. Rather, the function of a reviewing court is limited to insuring that there is sufficient competent evidence regarding each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime. Therefore, when reviewing a claim of insufficiency of the evidence, the evidence and all reasonable inferences that may be drawn

> therefrom are viewed in the light most favorable to the jury verdict. It is only when the evidence, viewed in this light, is so inconclusive or inherently improbable that a jury must have entertained a reasonable doubt as to the defendant's guilt that it is proper to overturn the conviction. ... 813 P. 2d at 1150.

In this case, the Defendant elected not to present any evidence in his defense. (Tr.-8, p. 93). Consequently, the testimony of Officer Meacham, combined with the certified driving record of the Defendant, Exhibit "1", constituted sufficient, competent, and unrebutted evidence on each element of the charge for the jury to convict the Defendant. Viewed in the light most favorable to the jury verdict, the State respectfully submits that the evidence introduced in this case was sufficient to support the jury verdict, and that the Defendant's conviction should be affirmed by this Court in all respects.

POINT II: DEFENDANT WAS NOT DENIED A SPEEDY TRIAL.

In this case, the Defendant was served with a copy of the Summons and Information by Deputy James Meacham on June 3, 1991. (R., pp. 184-186; Tr.-3, p. 9). He failed to appear in response to the Summons on either June 4, 1991, or June 11, 1991, being the next two (2) Tuesdays following that service. (Tr.-3, pp. 10-11, 22-23; see Court calendars attached as Exhibits 1, 2, and 3 to Reply to Motion to Dismiss for Lack of Speedy Trial (R., pp. 128 - 138)). Instead, he voluntarily absented himself from the jurisdiction. (Tr.-3, pp. 24, 27).

Thereafter, a Bench Warrant was issued. After the Defendant was brought back before the Court on another, unrelated Bench Warrant, he was then arraigned on this Information on January 31, 1992. (R., pp. 172-174). The matter then proceeded through pre-trial motions, and trial was held on May 8, 1992. Notwithstanding the jail sentence which he served in connection with another case, the Defendant has never been incarcerated on the charge in this case. (Tr.-3, pp. 12-13).

In Barker v Wingo, 407 U.S. 514 (1972), the United States Supreme Court established a balancing test in dealing with the right to a speedy trial, considering four (4) factors: (1) the length of delay; (2) the reason for the delay; (3) the Defendant's assertion of his right; and (4) prejudice to the Defendant. The Utah appellate courts have adopted this balancing test on this issue. See, State v. Weddle, 29 Utah 2d 145, 506 P.2d 67 (1973); State v. Trafny, 799 P.2d 704 (Utah 1990); State v. Hoyt, 806 P.2d 204 (Utah App. 1991).

In this case, in considering the length of and the reason for any delay, it is readily apparent that all delays before the trial were caused by the Defendant's own conduct. If he had appeared, pursuant to the Summons which was served upon him on June 3, 1991, and requested a trial, the trial would have been scheduled shortly thereafter. Instead, the Defendant voluntarily absented himself from the jurisdiction. It was not until he was arrested on various

other bench warrants that he was brought back before the Court to be arraigned in this case.

Once the case was brought back onto the calendar, the Court was obliged to deal with Defendant's pre-trial motions, prior to the trial itself. After various hearings, the trial was held on May 8, 1992.

The Defendant first asserted the claim of denial of a speedy trial, by way of his Motion to Dismiss filed on February 7, 1992. (R., pp. 147-159). [On February 4, 1992, the Court had initially set the trial for February 21, 1992. (R., p 170). The next day, defendant and his counsel filed a waiver of trial within 30 days, pending the State's response to his discovery request. (R., pp. 168-169).] However, because the entire time period between the date the Defendant was served with the Information and Summons (June 3, 1991) and the date of his arraignment (January 31, 1992) was caused by the Defendant voluntarily absenting himself from the jurisdiction, no prejudice accrued to the Defendant. Furthermore, the time period between the date of arraignment and the date of trial was occupied by responding to and hearing the Defendant's pre-trial motions. Therefore, as this Court noted in State v. Hoyt, cited above, "... When a defendant's actions cause delay in the trial date, the right to a speedy trial is temporarily waived by those actions. ...' [T]he right to a speedy trial is meant to be

a shield against oppression, and not a sword to be used to decapitate the process of justice.'..." 806 P.2d at 208.

For all of the foregoing reasons, the trial court correctly ruled that Defendant was not denied a speedy trial in this case, and denied Defendant's Motion to Dismiss accordingly. This Court should affirm that ruling.

POINT III: DEFENDANT WAS NOT DENIED EQUAL PROTECTION OR DUE PROCESS.

Defendant claims that the officer's failure to either issue to him a citation, or to arrest him on the spot, somehow constitutes a violation of equal protection and due process. Officer Meacham explained that he did not arrest or cite the Defendant on the day he saw him driving, because he was not in uniform and did not have his customary law enforcement equipment with him. (Tr.-3, p. 9; Tr.-8, p. 73). Consequently, after verifying the fact that the Defendant's driver's license was suspended as of the date of the incident, and obtaining a certified copy of his driving record, an Information and Summons were issued in this case.

Defendant's argument ignores the fact that, pursuant to Rule 6(b), Utah Rules of Criminal Procedure, a summons may be issued in lieu of a warrant of arrest to require the appearance of the accused. That procedure is expressly authorized and sanctioned by applicable law, and was followed in this case. The date when the original documents were ultimately filed with the Court is

irrelevant to Defendant's claim, because he was personally served with a copy of the Information and Summons on June 3, 1991, and then never appeared in response thereto until he was arrested in January, 1992. Therefore, he cannot now be heard to complain that he was not cited or arrested on the date of this incident. Defendant's argument is without merit.

POINT IV: THE TRIAL COURT HAD PROPER JURISDICTION.

In May and June, 1991, pursuant to Utah Code Annotated §78-4-5, the First Circuit Court had jurisdiction over all classes of misdemeanors occurring within Logan City, because there was neither a municipal justice court nor a county justice court in existence at that time. [The Logan City Municipal Justice Court was created, effective January 1, 1992.]

The testimony of Officer Meacham was clear and undisputed that he saw the Defendant driving a motorcycle within the city limits of Logan, Utah. (Tr.-3, pp. 7-8; Tr.-8, pp. 52-57). At that point, the elements of "driving on a highway within Cache County" of the charge of Driving on Suspension were complete; and all that remained was to prove that the Defendant's driver's license was suspended as of that date, which was accomplished by way of the certified copy of Defendant's driving record, Exhibit "1". The fact that the Defendant then proceeded and was followed by the officer into a neighboring community, where a municipal justice court is located, is irrelevant. The offense was complete at the

intersection in Logan, Utah, where the Defendant was first seen driving by the officer. The Circuit Court properly exercised its jurisdiction in this case, and ruled correctly in denying Defendant's Motion to Dismiss for Lack of Jurisdiction in this case. This Court should affirm that ruling.

POINT V: THE METHOD OF SEATING THE JURY PANEL WAS IRRELEVANT.

The method in which the jury panel was initially called in this case is irrelevant. No matter how they were seated to begin with, each party was afforded full and fair opportunity to challenge individual jurors for cause, and to exercise the requisite number of peremptory challenges. (Tr.-8, pp. 2-37; R., p. 36).

The Defendant has failed to cite any authority or otherwise to demonstrate any legitimate reason why the method of preliminarily seating the jury in this case could possibly have rendered the jury which was selected to try the case either unfair or partial. Therefore, because any error in seating the jury was harmless in this case, the Defendant's argument is without merit, and should be disregarded.

POINT VI: THE JURY WAS PROPERLY IMPANELED.

Defendant's claim that the jurors were not willing to give him the presumption of innocence has no basis in fact. The record indicates that the presumption of innocence was explained

thoroughly by the Court during voir dire. (Tr.-8, pp. 27-35). The Court specifically explained the Defendant's right not to testify. (Tr.-8. pp. 32-33). Finally, the Court further pursued Defense counsel's claim that only one juror could be fair, by asking, "If you could not be fair, if you cannot be fair and wouldn't want somebody with your frame of mind sitting on the case, raise your hand." (Tr.-8, p. 34). The record is silent thereafter, indicating that no hand was raised.

Furthermore, the Court instructed the jury on the presumption of innocence and the Defendant's right not to testify. (R., pp. 38, 41, 50, 51).

Therefore, Defense counsel's argument is taken out of context. The record clearly reflects that the Court took great care to insure that a fair and impartial jury was seated and correctly instructed. There is no basis for claiming otherwise.

POINT VII: THE MENTION OF DRIVING IN RIVER HEIGHTS WAS IRRELEVANT.

The only time during the trial when the City of River Heights was mentioned was during Mr. Preston's opening statement. (Tr.-8, pp. 47-48). Defense counsel immediately objected, the Court instructed the jury to disregard the statement, and Mr. Preston then explained that the State's position was that the Defendant was driving a motor vehicle in Logan City while his driver's license was suspended. Mr. Preston's opening statement was not evidence.

When Officer Meacham was called to testify, he merely stated that he followed the Defendant "approximately a mile-and-a-half to two miles, total." (Tr.-8, p. 56). The City of River Heights was never mentioned.

As set forth in Point IV, above, Mr. Preston scrupulously avoided any reference to the Defendant driving in the City of River Heights during the presentation of evidence, consistent with the ruling of the trial court on April 24, 1992. (Tr.-24, pp. 5-11). Because the Defendant did not testify, no rebuttal evidence on driving in River Heights was necessary. All evidence introduced by the State established that the crime was completed in Logan City, Cache County, State of Utah. Defendant has demonstrated no legitimate basis for a mistrial on this issue.

POINT VIII: THE EXPIRATION OF DEFENDANT'S DRIVER'S LICENSE WAS IRRELEVANT.

At the trial of this case, the State introduced into evidence as Exhibit "1" a certified copy of the Defendant's driving record. (R., pp. 76-84). That record shows that the Defendant's Utah driver's license was last suspended on July 24, 1989, which status remained effective on the date of this incident. The fact that Defendant's driver's license may have subsequently expired is irrelevant.

Defense counsel cites no authority for the proposition that, once a driver's license expires, it is no longer suspended. It is

obvious that a driver's license which has merely expired may be readily renewed, while a driver's license which has been suspended may not be reinstated without compliance with the terms and conditions provided by law. (R., pp. 78-79; see Utah Code Ann. §41-12a-412). Defendant's argument is without merit, and the trial court properly denied Defendant's Motion for Directed Verdict on that issue.

POINT IX: DEFENDANT WAS NOT ENTITLED TO AN INSTRUCTION ON A LESSER-INCLUDED OFFENSE.

The Defendant was not entitled to a lesser-included offense instruction on the charge of Driving Without a License, in violation of Utah Code Ann. §41-2-104, in this case. First, contrary to defense counsel's representations to the trial court, and his proposed jury instruction and verdict forms (R., pp. 58-60), that charge is not a lesser included offense of the underlying charge of Driving During Suspension. It is not an infraction, as represented by defense counsel; instead, it is a Class C Misdemeanor, as is the original charge, pursuant to Utah Code Ann. §41-2-137. [Utah Code Ann. §41-6-12, cited by defense counsel, only applies to violations of Chapter 6 of Title 41. Violations of Chapter 2 of Title 41 are governed by §41-2-137, above.] Therefore, by definition, because it was the same degree of offense as the original charge, it was not a "lesser" included offense.

Second, it was not an "included" offense, as defined by Utah Code Ann. §76-1-402(3). As set forth in Point VIII, above, a

person's driver's license may still be suspended, subject to reinstatement, even after it has expired, and defense counsel has cited no authority to the contrary. As this Court observed in State v Kinsey, 797 P.2d 425, 429 (Utah App. 1990), in comparing the statutory elements of each crime, it is evident that §41-2-104 merely prohibits operating a motor vehicle unless the person is a licensed driver, while §41-2-136 adds the additional element that the person's driver's license has first been denied, suspended, disqualified, or revoked, and the person then operates a motor vehicle while that license is denied, suspended, disqualified, or revoked. Expiration of the license is not tantamount to a status of being denied, suspended, disqualified, or revoked, since it does not require the same procedure for reinstatement.

Finally, Defendant provided no rational basis for the jury to acquit him of the original charge, since he put on no evidence in his defense. In State v Crick, 675 P.2d 527 (Utah 1983) at 531, the Supreme Court held that "the evidence must provide a rational basis for both acquitting of the charged offense and convicting of the lesser included offense." (Emphasis in original.) Defendant provided no such basis in this case. The trial court properly refused to give Defendant's proposed instruction on what was, in fact, not a lesser included offense.

POINT X: THERE WAS NO IMPROPER CONTACT WITH A JUROR IN THIS CASE.

In this case, during a recess of the trial, one of the jurors

apparently overheard the name of Mr. Perry being mentioned in a conversation which took place in the foyer between Mr. Preston and Officer Meacham. The Court immediately examined that juror on the record (Tr.-8, pp. 81-85), and determined that no improper contact occurred.

In Logan City v Carlsen, 799 P. 2d 224 (Utah App. 1990) at 226, this Court observed that incidental or inconsequential contacts will not give rise to this rule (raising a rebuttable presumption of prejudice). By the stage of the trial when the conversation occurred, the jury had long since been questioned and sworn, and the State had concluded its case-in-chief. The juror in question had been present throughout the proceedings, and had obviously seen and heard Mr. Perry in the Courtroom. The mere overhearing of his name during a subsequent recess constitutes the most insignificant, incidental, and inconsequential contact imaginable.

Following his questioning of the juror, the Court was satisfied that no prejudice had occurred. Defense counsel's after-the-fact Affidavit of Possible Juror Bias (R., pp. 8-9) is of no avail, since there is no evidence whatsoever in the record that that juror either demonstrated any actual bias or prejudice during the trial, or overheard any improper comments by counsel or the officer during the recess. No improper contact occurred in this case.

POINT XI: DEFENDANT WAS PROPERLY IDENTIFIED IN THIS CASE.

Contrary to defense counsel's representation that the portion of the trial transcript quoted in the Appendix to Appellant's Brief constitutes the only evidence from which the jury could find the Defendant to be the same person identified in the certified driving record, Officer Meacham clearly identified the Defendant as the person he saw driving on the date in question. (Tr.-8, pp. 50-57). The Officer had personally obtained the certified copy of the Defendant's driving record, Exhibit "1". The Defendant offered no evidence in rebuttal to the certified driving record, either to claim that he was not the same person, or that he had not received notice of the suspension. Finally, the identical name and date of birth appear on both the Information and on Exhibit "1", and the jury had access to both records to determine the Defendant's identity. (R., pp. 76-84, 186).

Utah Code Ann. §41-2-122 provides that notice given by mail is complete upon the expiration of four (4) days after the deposit of the notice in the mail, addressed to the address shown by the records of the Driver's License Division. There being no evidence to the contrary in the record, Defendant's argument is without merit.

POINT XII: THE STATUS OF THE OFFICER AS A BAILIFF WAS IRRELEVANT.

Once again, defense counsel cites no authority whatsoever for his claim that the officer should not have both acted as bailiff

and testified as a witness at the Motion hearing on April 3, 1992. Moreover, defense counsel expressly waived any objection thereto. (Tr.-3, pp. 3-4). The Defendant was not incarcerated, so there was no issue with courtroom security. A different bailiff was provided at the trial. In short, there was no possible prejudice which could have resulted to the Defendant. Defendant's claim is without merit.

POINT XIII: DEFENDANT'S OBJECTION TO CHANGING THE DATE ON THE INFORMATION WAS WITHOUT MERIT.

Rule 4(d), Utah Rules of Criminal Procedure, clearly provides that an information may be amended at any time before verdict, so long as the substantial rights of the Defendant are not prejudiced. Defendant made no request for a bill of particulars or other inquiry regarding this incident. Therefore, he cannot now claim prejudice from evidence which established the date of the offense. State v Fulton, 742 P.2d 1208 (Utah 1987), cert. denied, 484 U.S. 1044 (1988).

This issue was given a full and fair hearing at the time of the hearing on April 3, 1992. The trial court correctly granted the motion to amend, and this Court should affirm that ruling.

CONCLUSION

For all of the foregoing reasons, the State respectfully submits that the Defendant has neither marshaled sufficient evidence nor demonstrated sufficient error which would warrant a reversal of any of the rulings of the trial court, or an overturning of the jury verdict of guilty and the judgment of conviction entered in this case. On the contrary, there is substantial, competent, and unrebutted evidence to support every element of the charge in this case. Therefore, the State respectfully requests that this Court sustain the jury verdict and affirm the judgment and rulings of the trial court in all respects.

DATED this 28th day of August, 1992.

Patrick B. Nolan

PATRICK B. NOLAN
Deputy Cache County Attorney
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1992, I delivered four (4) copies of the foregoing Brief of Appellee to Ted S. Perry, Attorney for Defendant and Appellant, at 29 West 100 North, Logan, Utah 84321.

Patrick B. Nolan

PATRICK B. NOLAN
Deputy Cache County Attorney
Attorney for Appellee

ADDENDUM TO BRIEF

magistrate having jurisdiction to investigate charge and determine if there was probable cause to believe that offense had been committed and that defendant was guilty thereof State v. Freeman, 93 Utah 125, 71 P.2d 196 (1937).

Prosecution by complaint.

Filing of complaint in district court by district attorney charging defendant with injuring cow by altering and defacing brand was improper, as statute provided that all criminal matters in district court could only be prosecuted by information or indictment. State v. Johnson, 100 Utah 316, 114 P.2d 1034 (1941).

Prosecution by information.

—Constitutionality.

Prosecution by information for noncapital felony, committed after statehood, was not in violation of federal Constitution. Maxwell v. Dow, 176 U.S. 581, 20 S. Ct. 448, 44 L. Ed. 597 (1900).

—Presentment and filing.

Once the information is authorized by the prosecuting attorney, its presentment and filing are not acts which the prosecuting attorney must personally perform. State ex rel. Cannon v. Leary, 646 P.2d 727 (Utah 1982).

—Procedure.

The steps required to properly initiate prosecution of a felony by information are: (1) screening of the case by the prosecutor; (2) authorization of the prosecution, evidenced by the signature of the prosecutor affixed to the information; (3) presentment of the information to a magistrate, (4) subscribing and swearing to the information by the complaining witness, and (5) filing of the information with the magistrate or clerk of the court. State ex rel Cannon v. Leary, 646 P.2d 727 (Utah 1982).

—Signature.

Deputy district attorney being authorized by law to subscribe and file information, his signing as district attorney, while constituting an irregularity, did not invalidate information. State v. Merritt, 67 Utah 325, 247 P. 497 (1926).

Although prosecutor's authorization and signature affixed on the reverse side of an information violated Rule 10(d), U.R.C.P., requiring limiting impressions to one side of the paper only, such violation did not deprive the trial court of jurisdiction. State ex rel. Cannon v. Leary, 646 P.2d 727 (Utah 1982).

Filing of information was held to toll the statute of limitations even though prosecuting attorney forgot to sign it, since the error did not prejudice the defendant, and was one that could be corrected. State v. Strand, 674 P.2d 109 (Utah 1983).

When jurisdiction of district court attaches.

The accused was brought under the power of the district court by the filing of the information; the function of the record from the committing magistrate was to evidence the regularity or irregularity of the proceedings leading up to attachment of jurisdiction. State v. Trujillo, 117 Utah 237, 214 P.2d 626 (1950).

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d Indictments and Informations §§ 2, 4, 25 to 28.

C.J.S. — 42 C.J.S. Indictments and Informations §§ 1, 3, 66.

A.L.R. — Power of private citizen to institute criminal proceedings without authorization or approval by prosecuting attorney, 66 A.L.R.3d 732.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.

Key Numbers. — Indictment and Information ⇐ 1, 3, 5, 36, 39.

Rule 6. Warrant of arrest or summons.

(a) Upon the return of an indictment the magistrate shall cause to issue either a warrant for the arrest or a summons for the appearance of the accused.

Upon the filing of an information, if it appears from the information, or from any affidavit filed with the information, that there is probable cause to believe that an offense has been committed and that the accused has committed it, the magistrate shall cause to issue either a warrant for the arrest or a summons for the appearance of the accused.

(b) If it appears to the magistrate that the accused will appear on a summons and there is no substantial danger of a breach of the peace, or injury to

persons or property, or danger to the community, a summons may issue in lieu of a warrant of arrest to require the appearance of the accused. If the defendant is a corporation, a summons shall issue. A warrant of arrest may issue in cases where the defendant has failed to appear in response to a summons or citation or thereafter when required by the court. When a warrant of arrest is issued, the amount of bail shall be fixed by the magistrate and stated on the warrant.

(c) (1) The warrant shall be executed by a peace officer. The summons may be served by a peace officer or any person authorized to serve a summons in a civil action.

(2) The warrant may be executed or the summons may be served at any place within the state.

(3) The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request shall show the warrant to the defendant as soon as practicable. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that the warrant has been issued. The summons shall be served as in civil actions, or by mailing it to the defendant's last known address.

(4) The person executing a warrant or serving a summons shall make return thereof to the magistrate as soon as practicable. At the request of the prosecuting attorney, any unexecuted warrant shall be returned to the magistrate for cancellation.

Cross-References. — Arrest generally, § 77-7-1 et seq.

Bail, § 77-20-1 et seq.

Bench warrant, failure of one on bail to appear at arraignment, Rule 10.

Bench warrant, failure of one on bail to appear for judgment, Rule 22.

Citation for misdemeanor, §§ 77-7-18 to 77-7-20.

Extradition, governor's warrant, § 77-30-7.

Fees of constable serving warrant or summons, § 21-3-3.5.

"Magistrate" defined, § 77-1-3.

Rules of Evidence inapplicable to proceedings for issuance of warrant for arrest or for issuance of criminal summons, Rule 1101, U.R.E.

Youth Parole Authority, revocation of parole, order to retake violator, § 62A-7-112

NOTES TO DECISIONS

Analysis

Affidavits.

Affidavits for arrest need not show a prima facie case; affidavits need only set forth facts tending to establish the commission of the offense and the guilt of the defendant. United States v Eldredge, 5 Utah 161, 13 P 673 (1887), appeal dismissed, 145 U S. 636, 12 S. Ct. 980, 36 L Ed 857 (1892)

Issuance of warrant.

—Discretion of magistrate.

A magistrate is not justified in refusing to issue a warrant unless the charge is too indefinitely stated to warrant the belief that an offense has been committed, or that defendant is the guilty party. United States v Eldredge, 5 Utah 161, 13 P. 673 (1887), appeal dismissed, 145 U S 636, 12 S Ct. 980, 36 L Ed 857 (1892).

78-4-3. Definitions [Repealed effective January 1, 1992].

As used in this act:

(1) "Primary circuit court location" means a city or cities in each circuit where the circuit judge or judges maintain regular court hours in a permanent court facility from which secondary locations in the circuit are served under this act. The city may or may not be a county seat, and there may be more than one primary location in a circuit.

(2) "Secondary circuit court location" means those county seats where services are provided by the county, pursuant to contract with the administrative office of the courts.

History: C. 1953, 78-4-3, enacted by L. 1977, ch. 77, § 1; 1988, ch. 248, § 28.

Repealed effective January 1, 1992. — Laws 1991, ch. 268, § 49 repeals § 78-4-3, as last amended by L. 1988, ch. 248, § 28, relating to circuit courts definitions, effective January 1, 1992.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, rewrote Subsection (2) following "county" which had read "seat cities or other municipalities in the circuit served by the circuit judge or judges from the primary circuit location or locations"; deleted former Subsections (3) to (7) which had contained definitions of "Clerk of the circuit court," "Circuit court clerk's office," "Record on appeal," "Transcribed record on appeal," and "Substitute judge"; and made minor stylistic changes in Subsection (1).

Meaning of "this act." — The term "this act," in the preliminary language and in Subsection (1), means Laws 1977, Chapter 77, which enacted various sections throughout Titles 10, 11, 17, 20, 21, 31 (now repealed), 39, 49, 51, 53 (now repealed), 76, and 78. See the Tables of Session Laws in the Parallel Tables volume.

78-4-5. Jurisdiction — Exclusive and concurrent [Effective until January 1, 1992].

(1) (a) Circuit courts have jurisdiction over all classes of misdemeanors and infractions involving persons 18 years of age and older and may impose the punishments prescribed for these offenses. The judge of the circuit court has the authority and jurisdiction of a magistrate including the

conducting of proceedings for the preliminary examination to determine probable cause, commitment prior to trial, or the release on bail of persons charged with criminal offenses.

(b) When a complaint may be commenced before a magistrate under Section 77-3-1 or an arrested person is to be taken before a magistrate under Section 77-7-18, the complaint may be commenced or the arrested person may be taken before any circuit court judge in the county or the justice court judge in the county in whose precinct the offense occurred, unless both are unavailable; then before any justice court judge having jurisdiction.

(c) All complaints for offenses charged under Title 41 except offenses charged under Article 5, Chapter 6, Title 41, shall be filed in the municipal justice court or the county justice court where the offense occurred if those justice courts exist and have jurisdiction of the offenses.

(2) The circuit court has exclusive original jurisdiction of all cases arising under or by reason of the violation of any county ordinance involving persons 18 years of age or older, but if a county justice court exists in the county, jurisdiction is concurrent.

(3) (a) The circuit court has exclusive original jurisdiction of all cases arising under or by reason of the violation of any municipal ordinance involving persons 18 years of age and older in those municipalities in which a municipal department of the circuit court exists or has been created.

(b) The circuit court has concurrent jurisdiction with county justice courts over violations of municipal ordinances charging persons 18 years of age and older with driving under the influence of alcohol or drugs, driving with a blood alcohol content of .08% or higher, or reckless driving in municipalities within a county precinct in which a municipal justice court does not exist.

(c) The circuit court has concurrent jurisdiction with municipal justice courts over violations of state statutes in municipalities where a municipal justice court exists.

(4) The circuit court has jurisdiction over traffic offenses committed by persons older than 16 and younger than 18 years of age except those offenses exclusive to the juvenile court under Subsection (1)(c), Subsection 78-3a-16(1)(a), and Section 78-5-105. The circuit court shall notify the juvenile court of a conviction of any person younger than 18 years of age of an offense under Section 78-3a-39.5.

(5) The circuit court has authority to take the juvenile's driver license and return it to the Driver License Division, Department of Public Safety, for suspension under Section 41-2-128.

(6) Circuit court judges may transfer cases within the court's jurisdiction under Subsection (4) to the juvenile court for postjudgment proceedings according to rules of the Judicial Council.

Circuit court jurisdiction — Jurisdiction in circuit court when no justice court — Jurisdiction retained until effective date [Effective January 1, 1992].

Circuit courts have jurisdiction over class A misdemeanors. Circuit courts have jurisdiction over class B misdemeanors classified by Article 5, Chapter 6,

Title 41, Driving While Intoxicated and Reckless Driving, ordinances that comply with the requirements of Section 41-6-43, and class B misdemeanors classified by any title other than Title 41. Circuit courts have jurisdiction over all related misdemeanors arising out of a single criminal episode. When a justice court is given jurisdiction of a criminal matter and there is no justice court with territorial jurisdiction, the circuit court shall have jurisdiction. The circuit court shall retain jurisdiction over cases properly filed in the circuit court prior to January 1, 1992. The circuit court shall have jurisdiction as provided in Section 10-3-923.

History: C. 1953, 78-4-5, enacted by L. 1977, ch. 77, § 1; 1988, ch. 248, § 29; 1989, ch. 150, § 5; 1989, ch. 157, § 9; 1989, ch. 188, § 8; 1990, ch. 55, § 2; 1991, ch. 268, § 30.

Amended effective January 1, 1992. — Laws 1991, ch. 268, § 30 amends this section effective January 1, 1992. See amendment note below.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, divided Subsection (1) into subsections; substituted "Section 77-3-1" and "Section 77-7-18" for "Section 77-57-2" and "Section 77-13-17," respectively, in the first sentence of Subsection (1)(b); and made minor stylistic changes throughout.

The 1989 amendment by ch. 150, effective April 24, 1989, rewrote Subsection (4) which read "The circuit court has concurrent jurisdiction with the juvenile court over all traffic offenses committed by persons younger than 18 years of age"; added Subsection (5); and made a minor stylistic change in Subsection (2).

The 1989 amendment by ch. 157, effective July 1, 1989, designated the former second sentence of Subsection (1)(b) as Subsection (1)(c); substituted "justice court judge" for "justice of the peace" in two places in present Subsection (1)(b); substituted "municipal justice court or the county justice court" for "court of the municipal justice of the peace of the precinct of the county justice of the peace" in Subsection (1)(c); substituted "a county justice court" for "the office of precinct justice of the peace" in Subsection (2); designated former Subsection (3) as present Subsection (3)(a); added Subsections (3)(b) and (3)(c); and made stylistic changes throughout the section.

The 1989 amendment by ch. 188, effective July 1, 1989, designated the former second sentence of Subsection (1)(b) as (1)(c); added the second sentence of Subsection (4); and made minor stylistic changes.

The 1990 amendment, effective April 23, 1990, rewrote the first sentence in Subsection (4), which read "The circuit court has jurisdiction over all traffic offenses committed by persons younger than 18 years of age, except those offenses exclusive to the juvenile court under Subsection 78-3a-16(1)(a)," and added Subsection (6).

The 1991 amendment, effective January 1, 1992, deleted the (1)(a) designation, rewrote the first sentence, which read "Circuit courts have jurisdiction over all classes of misdemeanors and infractions involving persons 18 years of age and older and may impose the punishments prescribed for these offenses," deleted the former second sentence, which read "The judge of the circuit court has the authority and jurisdiction of a magistrate including the conducting of proceedings for the preliminary examination to determine probable cause, commitment prior to trial, or the release on bail of persons charged with criminal offenses," added the remaining language, and deleted former Subsections (1)(b), (1)(c), and (2) through (6).

78-4-6. Municipal department of circuit court — Report to court administrator [Repealed effective January 1, 1992].

(1) (a) The governing body of any municipality may by ordinance establish a municipal department of the circuit court. A circuit court in this capacity is the "municipal department of the (naming the circuit) circuit court for (naming the municipality), Utah."

(b) A circuit court established under Subsection (1)(a), for which funding is not available at time of establishment, may not be implemented until funding is provided for the court.

Subsection (1) when a person fails or refuses to surrender any of those documents to the division upon demand.

(3) The division shall assess against a person making an application referred to in Subsection 41-2-112(14), in addition to any fee imposed under Subsection 41-2-112(14), a fee under Section 41-2-103, which shall be paid before the person's driving privilege is reinstated, to cover the costs required to serve orders related to the purposes of Subsection (2).

History: C. 1953, 41-2-23.5, enacted by L. 1983, ch. 191, § 1; renumbered by L. 1987, ch. 137, § 34; 1988, ch. 98, § 1; 1989, ch. 209, § 19; 1990, ch. 30, § 7.

Amendment Notes. — The 1989 amendment, effective July 1, 1989, inserted "disqualification" in Subsection (1)(a)(i).

The 1990 amendment, effective April 23, 1990, substituted "Subsection 41-2-112(14)" for "41-2-112(6)" in two places in Subsection (3).

41-2-136. Operating vehicle prohibited while license denied, suspended, disqualified, or revoked — Penalties.

(1) A person whose license has been denied, suspended, disqualified, or revoked under this chapter or under the laws of the state in which his license was issued and who operates any motor vehicle upon the highways of this state while that license is denied, suspended, disqualified, or revoked shall be punished as provided in this section.

(2) A person convicted of a violation of Subsection (1), other than a violation specified in Subsection (3), is guilty of a class C misdemeanor.

(3) (a) A person is guilty of a class B misdemeanor whose conviction under Subsection (1) is based on his operating a vehicle while his license is suspended, disqualified, or revoked for:

(i) a refusal to submit to a chemical test under Section 41-6-44.10;

(ii) a violation of Section 41-6-44;

(iii) a violation of a local ordinance that complies with the requirements of Section 41-6-43;

(iv) a violation of Section 76-5-207;

(v) a criminal action that the person plead guilty to as a result of a plea bargain after having been originally charged with violating one or more of the sections or ordinances under this subsection;

(vi) a revocation or suspension which has been extended under Subsection 41-2-127(2); or

(vii) where disqualification is the result of driving a commercial motor vehicle while the person's CDL is disqualified, suspended, canceled, or revoked under Subsection 41-2-715(1).

(b) A person is guilty of a class B misdemeanor whose conviction under Subsection (1) is based upon his operating a vehicle while his license is suspended, disqualified, or revoked in his state of licensure for violations corresponding to the violations listed in Subsection (a).

(c) A fine imposed under this subsection shall be at least the maximum fine for a class C misdemeanor under Section 76-3-301.

History: L. 1933, ch. 45, § 29; C. 1943, 57-4-32; L. 1983, ch. 99, § 8; 1983, ch. 183, § 27; C. 1953, 41-2-28; renumbered by L. 1987, ch. 137, § 36; 1989, ch. 209, § 20; 1989, ch. 252, § 7; 1990, ch. 30, § 8; 1991, ch. 241, § 60; 1992, ch. 80, § 3.

Amendment Notes. — The 1989 amendment by ch. 252, effective April 24, 1989, in-

serted "denied" in two places in Subsection (1) and substituted "Subsection" for "Section" in Subsection (3)(a)(vi).

The 1989 amendment by ch. 209, effective July 1, 1989, inserted "disqualified" twice in Subsection (1) and once in Subsection (3)(a), and made stylistic changes.

The 1990 amendment, effective April 23, 1990, inserted "violation of a" before "local" in Subsection (3)(a)(iii); substituted "action" for "prohibition" and inserted "to" after "guilty" in Subsection (3)(a)(v); substituted "a revocation or suspension which" for "whose revocation or suspension" at the beginning of Subsection (3)(a)(vi); and added Subsection (3)(a)(vii).

The 1991 amendment, effective April 29, 1991, substituted "class C" for "class B" in Subsections (2) and (3)(b) and substituted "class B" for "class A" in Subsection (3)(a).

The 1992 amendment, effective April 27, 1992, substituted "or under the laws of the state in which his license was issued and who operates" for "and operates" in Subsection (1), substituted "that" for "which" in Subsection (3)(a)(iii), added present Subsection (3)(b), redesignated former Subsection (3)(b) as present Subsection (3)(c), and substituted "at least" for "in an amount not less than" in Subsection (3)(c).

NOTES TO DECISIONS

Cited in United States v. Peck, 762 F. Supp. 315 (D Utah 1991).

41-2-137. Violation of chapter — Misdemeanor.

A violation of this chapter is a class C misdemeanor, unless otherwise specified.

History: L. 1933, ch. 45, § 30; C. 1943, 57-4-33; L. 1967, ch. 83, § 1; 1983, ch. 99, § 9; 1986, ch. 178, § 25; C. 1953, 41-2-29; renumbered by L. 1987, ch. 137, § 37; 1991, ch. 241, § 61.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "class C" for "class B."

PART 2

LICENSES — IMPAIRED PERSONS

41-2-202. Driver License Medical Advisory Board — Membership — Guidelines for licensing impaired persons — Recommendations to division.

Sunset Act. — Section 63-55-241 provides that the Driver License Medical Advisory Board is repealed July 1, 1997.

History: C. 1953, 41-2-103, enacted by L. 1987, ch. 137, § 3; 1989, ch. 209, § 2; 1989, ch. 252, § 2; 1990, ch. 30, § 2; 1991, ch. 190, § 2.

Amendment Notes. — The 1989 amendment by ch. 252, effective April 24, 1989, inserted "or if denied under Section 41-2-114" in Subsection (4)(a) and added "and" at the end of Subsection (13).

The 1989 amendment by ch. 209, effective July 1, 1989, so rewrote the section as to make a detailed analysis impracticable.

The 1990 amendment, effective April 23, 1990, rewrote the section to such an extent that a detailed analysis is impracticable.

The 1991 amendment, effective October 1, 1991, substituted "Section 41-2-112 is $15" for "Subsection 41-2-112(1) is $10"in Subsections (1) and (2); substituted "Section 41-2-112 is $20" for "Subsection 41-2-112(1) is $15" in Subsections (3) and (4); substituted "Section 41-2-112" for "Subsection 41-2-112(1)" in Subsection (5); substituted "Section 41-2-125 is $15" for "Subsection 41-2-125(5) is $10" in Subsections (6) to (9); substituted "Section 41-2-125" for "Subsection 41-2-125(5)" in Subsection (10); substituted "Section 41-2-125 is $5" for "Subsection 41-2-125(5) is $3" in Subsection (11); substituted "Section 41-2-125 is $12" for "Subsection 41-2-125(5) is $10" in Subsections (12) and (13); substituted "Section 41-2-125 is $12" for "Subsection 41-2-125(3)(a) is $10" in Subsections (14) and (15); substituted "Section 41-2-125" for "Section 41-2-125(5)" in Subsections (16) and (17); substituted "Section 41-2-112" for "Subsection 41-2-112(7)" in Subsections (22) and (23); substituted "$10" for "$5" in Subsection (24); substituted "Section 41-2-112" for "Subsection 41-2-112(14)" in Subsections (25)(a) and (25)(b); substituted "Section 41-2-130" for "Subsection 41-2-130(8)(a)" and "Section 41-6-44.10" for "Subsection 41-6-44.10(2)(e)" in Subsection (26); substituted "Section 41-2-134" for "Subsection 41-2-134(3)" in Subsection (28); added present Subsection (29) and (30); redesignated former Subsection (29) as present Subsection (31); and made a stylistic change.

41-2-104. Operators must be licensed — Taxicab endorsement.

(1) No person, except one expressly exempted under Section 41-2-107, 41-2-108, or 41-2-111, or Subsection 41-2-121(4), or Title 41, Chapter 22, may operate a motor vehicle on a highway in this state unless the person is licensed as an operator by the division under this chapter.

(2) No person, except those exempted under Section 41-2-107, may operate or, while within the passenger compartment of a vehicle, exercise any degree or form of physical control of a vehicle being towed by a motor vehicle upon a highway unless the person holds a valid license issued under this chapter for the type or class of vehicle being towed.

(3) (a) A person may not operate a motor vehicle as a taxicab on a highway of this state unless the person has a taxicab endorsement issued by the division on his driver license.

(b) This subsection applies to all Utah licenses originally issued, renewed, or extended on or after July 1, 1989.

History: L. 1933, ch. 45, § 2; C. 1943, 57-4-4; L. 1983, ch. 99, § 1; 1983, ch. 183, § 5; 1985, ch. 21, § 18; 1987, ch. 162, § 24; C. 1953, § 41-2-2; renumbered by L. 1987, ch. 137, § 4; 1987, ch. 162, § 24; 1989, ch. 209, § 3.

Amendment Notes. — The 1989 amendment, effective July 1, 1989, added Subsection (3).

NOTES TO DECISIONS

Cited in Asay v. Watkins, 751 P.2d 1135 (Utah 1988).

serted "denied" in two places in Subsection (1) and substituted "Subsection" for "Section" in Subsection (3)(a)(vi).

The 1989 amendment by ch. 209, effective July 1, 1989, inserted "disqualified" twice in Subsection (1) and once in Subsection (3)(a), and made stylistic changes.

The 1990 amendment, effective April 23, 1990, inserted "violation of a" before "local" in Subsection (3)(a)(iii); substituted "action" for "prohibition" and inserted "to" after "guilty" in Subsection (3)(a)(v); substituted "a revocation or suspension which" for "whose revocation or suspension" at the beginning of Subsection (3)(a)(vi); and added Subsection (3)(a)(vii).

The 1991 amendment, effective April 29, 1991, substituted "class C" for "class B" in Subsections (2) and (3)(b) and substituted "class B" for "class A" in Subsection (3)(a).

The 1992 amendment, effective April 27, 1992, substituted "or under the laws of the state in which his license was issued and who operates" for "and operates" in Subsection (1), substituted "that" for "which" in Subsection (3)(a)(iii), added present Subsection (3)(b), redesignated former Subsection (3)(b) as present Subsection (3)(c), and substituted "at least" for "in an amount not less than" in Subsection (3)(c).

NOTES TO DECISIONS

Cited in United States v. Peck, 762 F. Supp. 315 (D. Utah 1991).

41-2-137. Violation of chapter — Misdemeanor.

A violation of this chapter is a class C misdemeanor, unless otherwise specified.

History: L. 1933, ch. 45, § 30; C. 1943, 57-4-33; L. 1967, ch. 83, § 1; 1983, ch. 99, § 9; 1986, ch. 178, § 25; C. 1953, 41-2-29; renumbered by L. 1987, ch. 137, § 37; 1991, ch. 241, § 61.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "class C" for "class B."

PART 2

LICENSES — IMPAIRED PERSONS

41-2-202. Driver License Medical Advisory Board — Membership — Guidelines for licensing impaired persons — Recommendations to division.

Sunset Act. — Section 63-55-241 provides that the Driver License Medical Advisory Board is repealed July 1, 1997.

NOTES TO DECISIONS

ANALYSIS

Conduct constituting single crime.
Conduct constituting separate crimes.
—Property pawned separately.
Traffic offenses.
Cited.

Conduct constituting single crime.

Retention of stolen property of different individuals is a single act and a single offense if evidence shows that the items were retained simultaneously. Therefore, where stolen items were the subject of a previous prosecution for related offenses, a second prosecution was precluded. State v. Bair, 671 P.2d 203 (Utah 1983).

Conduct constituting separate crimes.

Where defendant committed a robbery in one county, and later, in another county some 65 miles away, picked up two hitchhikers and decided to kidnap them as hostages, the difference in time, location, and the criminal objectives of robbery and kidnapping rendered the conduct separate crimes rather than one single criminal episode. State v. Ireland, 570 P.2d 1206 (Utah 1977).

The unlawful taking of a vehicle and the failure to stop at the command of a police officer were two separate offenses, and not a single episode, because the two offenses occurred a day apart and the criminal objective in the unlawful taking was to obtain possession while the criminal objective in the failure to stop was to avoid arrest for a traffic violation. State v. Cornish, 571 P.2d 577 (Utah 1977).

Defendant's actions did not constitute a "single criminal episode" since he committed two separate burglaries by breaking into two separate buildings within an apartment complex, even though the burglaries were only 20 minutes apart. State v. Porter, 705 P.2d 1174 (Utah 1985).

—Property pawned separately.

Where property was stolen and defendant received and pawned it on three separate days spread over a period of 18 days, the offenses did not arise out of a single criminal episode. State v. Tarafa, 720 P.2d 1368 (Utah 1986).

Traffic offenses.

This section does not prevent the prosecution of a drunk driving charge under § 41-6-44 after the defendant has pleaded guilty to driving without a license, without a registration certificate and without a safety sticker, since the citations charge separate offenses entirely unrelated to each other. Hupp v. Johnson, 606 P.2d 253 (Utah 1980).

Cited in State v. O'Brien, 721 P.2d 896 (Utah 1986); State v. Larocco, 742 P.2d 89 (Utah Ct. App. 1987); State v. McGrath, 749 P.2d 631 (Utah 1988); State v. Fletcher, 751 P.2d 805 (Utah Ct. App. 1988); State v. Ortega, 751 P.2d 1138 (Utah 1988); State v. Johnson, 115 Utah Adv. Rep. 6 (1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 20.

C.J.S. — 22 C.J.S. Criminal Law § 14.

Key Numbers. — Criminal Law ⇐ 29.

76-1-402. Separate offenses arising out of single criminal episode — Included offenses.

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court, and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

History: C. 1953, 76-1-402, enacted by L. 1973, ch. 196, § 76-1-402; L. 1974, ch. 32, § 2.

Cross-References. — Computer Crimes Act not to bar prosecution for conduct also violating another statute, § 76-6-704.

Double jeopardy prohibited for same offense, Utah Const., Art. I, Sec. 12; U.S. Const., Amend. V; § 77-1-6.

NOTES TO DECISIONS

Analysis

"Act."

"Act" as used in Subsection (1) includes not only volitional acts of a defendant, but also the number of victims, as each is acted upon by a defendant. State v. Mane, 783 P.2d 61 (Ct. App. 1989).

Judgment entered for included offense after reversal of conviction.

Where there was insufficient evidence to support defendant's conviction for second degree murder, but there was sufficient evidence to support a conviction for the included offense of manslaughter, Supreme Court, pursuant to this section, vacated and set aside the conviction of second degree murder on appeal and entered a judgment of conviction for the included offense of manslaughter. State v. Bindrup, 655 P.2d 674 (Utah 1982).

Evidence of depraved indifference to the risk of death was insufficient to support defendant's conviction of second degree murder, but there was sufficient evidence of recklessness to support a conviction of the included offense of manslaughter; the Supreme Court, pursuant to Subsection (5), remanded the case to the trial court with directions to set aside the verdict and to enter a judgment of conviction for manslaughter. State v. Bolsinger, 699 P.2d 1214 (Utah 1985).

Jurisdiction of a single court.

Plea of guilty to two charges in justice of the

COLLATERAL REFERENCES

Am. Jur. 2d. — 7A Am. Jur 2d Automobiles and Highway Traffic § 96 et seq.

C.J.S. — 60 C.J.S. Motor Vehicles § 146.

Key Numbers. — Automobiles ⇐ 136.

41-2-122. Change of address — Duty of licensee to notify division within ten days — Method of giving notice by division.

(1) When a person, after applying for or receiving a license, moves from the address named in the application or in the license certificate issued to him, the person shall within ten days notify the division in writing of his new address and of the number of any license held by him.

(2) (a) When the division is authorized or required to give any notice under this chapter or other law regulating the operation of vehicles, unless a different method of giving notice is otherwise prescribed, the notice shall be given either by personal delivery to the person to be notified or by deposit in the United States mail of the notice in an envelope with postage prepaid, addressed to the person at his address as shown by the records of the division. The giving of notice by mail is complete upon the expiration of four days after the deposit of the notice.

(b) Proof of the giving of notice in either manner may be made by the certificate of any officer or employee of the division or affidavit of any person older than 18 years of age, naming the person to whom the notice was given and specifying the time, place, and manner of the giving of it.

History: C. 1953, 41-2-13.1, enacted by L. 1967, ch. 82, § 10; 1983, ch. 183, § 17; renumbered by L. 1987, ch. 137, § 22.

Amendment Notes. — The 1987 amendment renumbered this section which formerly appeared as § 41-2-13.1, designated the former section as Subsection (1), substituted "division" for "department" and made changes in phraseology in Subsection (1), and added Subsection (2).

41-2-123. Duplicate license certificate — Fee.

(1) If a license certificate issued under the provisions of this chapter is lost, stolen, or destroyed, the person to whom it was issued may obtain a duplicate upon furnishing proof satisfactory to the division that the license certificate has been lost, stolen, or destroyed and upon payment of a fee under Section 41-2-103.

(2) When the division is advised that a license certificate has been lost, stolen, or destroyed, it is then void.

History: L. 1933, ch. 45, § 14; 1935, ch. 47, § 2; 1941, ch. 51, § 2; C. 1943, 54-7-17; L. 1951, ch. 64, § 1; 1967, ch. 82, § 8; 1982, ch. 44, § 6; 1983, ch. 183, § 18; C. 1953, 41-2-14; renumbered by L. 1987, ch. 137, § 23.

Amendment Notes. — The 1987 amendment renumbered this section which formerly appeared as § 41-2-14, designated the first sentence as Subsection (1) and the second sentence as Subsection (2), substituted "division" for "department" throughout the section, and made minor changes in phraseology and style

History: C. 1953, 41-12a-407, enacted by L. 1985, ch. 242, § 48; 1991, ch. 203, § 4.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, added the Subsection (2) designation; redesignated former Subsection (2) as present Subsection (3), added Subsections (1)(a), (1)(b), and (4); deleted "and will continue to have the ability to pay judgments in an amount equal to twice the single limit amount under Subsection 31A-22-304(2)" following "has" in Subsection (1); substituted "chapter" for "subsection" in Subsection (2); and substituted "In accordance with Chapter 46b, Title 63, Administrative Procedures Act" for "Upon not less than five days' notice and a hearing pursuant to notice" in Subsection (3).

41-12a-412. Proof of owner's or operator's security required to preserve registration.

(1) A motor vehicle may not be registered in the name of any person required to file proof of owner's security unless proof of that security is furnished for the motor vehicle.

(2) (a) Subject to Subsection (b), if the department lawfully suspends or revokes the driver's license of any person upon receiving record of a conviction or a forfeiture of bail from a court of record, the department shall also suspend the registration for all motor vehicles registered in the name of the person.

(b) Unless otherwise required by law, the department may not suspend the person's motor vehicle registration under Subsection (a), if the person has given or immediately gives and then maintains proof of owner's security for all motor vehicles registered by the person.

(3) Licenses and registrations suspended or revoked under this section may not be renewed, nor may any driver's license thereafter be issued, nor may any motor vehicle be thereafter registered in the name of the person until he gives and thereafter maintains proof of owner's security.

(4) If a person is not licensed, but by final order or judgment is convicted of or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring the suspension or revocation of license, or for operating an unregistered motor vehicle upon the highways, a license may not thereafter be issued to the person and a motor vehicle may not continue or be registered in his name until he gives and thereafter maintains proof of owner's security.

(5) If the department suspends or revokes a nonresident's operating privilege because of a conviction or forfeiture of bail, the privilege remains suspended or revoked unless the person has given or immediately gives and thereafter maintains proof of owner's security.

History: C. 1953, 41-12a-412, enacted by L. 1985, ch. 242, § 48; 1992, ch. 80, § 4.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, added the subsection designations (2)(a) and (2)(b), added "Subject to Subsection (b)" at the beginning of Subsection (2)(a) and inserted "from a court of record" near the middle of that subsection, substituted all of the present language of Subsection (2)(b) before "if the person" for "The department may not suspend the person's motor vehicle registration unless otherwise required by law," and made stylistic changes throughout the section.

NOTES TO DECISIONS

Service on attorney.
Notice served upon a party's attorney of record is sufficient. State v Wagstaff, 772 P.2d 987 (Utah Ct. App 1989).

Rule 4. Prosecution of public offenses.

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.

(c) The court may strike any surplus or improper language from an indictment or information.

(d) The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

(e) When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

(f) An indictment or information shall not be held invalid because any name contained therein may be incorrectly spelled or stated.

(g) It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.

(h) Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.

(i) Use of the disjunctive rather than the conjunctive shall not invalidate the indictment or information.

(j) The names of witnesses on whose evidence an indictment or information was based shall be endorsed thereon before it is filed. Failure to endorse shall

not affect the validity but endorsement shall be ordered by the court on application of the defendant. Upon request the prosecuting attorney shall, except upon a showing of good cause, furnish the names of other witnesses he proposes to call whose names are not so endorsed

(k) If the defendant is a corporation, a summons shall issue directing it to appear before the magistrate. Appearance may be by an officer or counsel Proceedings against a corporation shall be the same as against a natural person

Cross-References. — Accused entitled to copy of accusation, Utah Const , Art I, Sec 12
Circuit courts, criminal jurisdiction, § 78-4-5
Jurisdiction of military court, § 39-6-16
Criminal Code definition of "corporation," § 76-2-201
Criminal Code not strictly construed, § 76-1 106
Criminal responsibility of corporation, § 76-2-204
Criminal responsibility of person for conduct in name of corporation, § 76-2-205
Double jeopardy, Utah Const , Art I, Sec 12, §§ 76-1-401 to 76-1-405, 77-1-6
General definitions for Criminal Code, § 76-1-601
"Indictment" defined, § 77-1-3
"Information" defined, § 77-1-3
Judicial notice, Rules of Evidence, Rule 201
Justice courts, criminal jurisdiction § 78-5-104 et seq
Juveniles, jurisdiction, transfer, §§ 78 3a-16 to 78-3a-19
Nonmaterial errors and mistakes, Rule 30
Preliminary examination, Rule 7
Proof of corporate existence, § 77-17-5
Prosecution by indictment or information after examination and commitment or waiver thereof, Utah Const , Art I, Sec 13
Removal of officers, Utah Const , Art VI, Sec 21, § 77-6-1 et seq
Statutory construction and definitions in general, §§ 68-3-11, 68-3-12

NOTES TO DECISIONS

Analysis

Bills of particulars.

—In general.

If an accused is in doubt as to the nature and cause of the accusation against him, the alleged fact or facts the state proposes to prove might be secured by demanding a bill of particulars State v Robbins, 102 Utah 119, 127 P 2d 1042 (1942)

Where defendant in manslaughter prosecution was charged with only one unlawful act, a battery, allegation in bill of particulars that battery occurred when defendant engaged in mutual combat with deceased was mere surplusage and did not state separate unlawful act State v Johnson, 112 Utah 130, 185 P 2d 738 (1947)

—Contents.

There is no requirement that defendant be told in a bill of particulars what evidence will be presented to prove the charge against him State v Moraine, 25 Utah 2d 51, 475 P 2d 831 (1970)

A bill of particulars need not plead matters of evidence that the prosecution plans to use at trial State v Mitchell, 571 P 2d 1351 (Utah 1977)

—Discretion of court.

Granting of bill of particulars was not discretionary with court, but under statute was a

Cache County Attorney

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County Attorney

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James C. Jenkins
Deputy
Jeffrey "R" Burbank
Deputy
Patrick B. Nolan
Deputy

September 01, 1992

Clerk, Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, UT 84102

Re: State v. Dunbar
Case No. 920341-CA

Dear Clerk:

We just realized that, in our Brief of Appellee in the above-entitled case, which we mailed to you on Friday, August 28, 1992, we inadvertently left out copies of the Criminal Summons and Information (pp. 184-186 of the Record) from the Addendum to the Brief.

Enclosed are eight (8) copies each of the Criminal Summons and Information. Please add them to the documents already included in the Addendum to the Brief.

We apologize for any inconvenience caused by this oversight, and thank you for your assistance.

Respectfully submitted,

Patrick B. Nolan

PATRICK B. NOLAN
Deputy Cache County Attorney

Enclosures

cc: Ted Perry (w/enclosures)

PBN:cat

IN THE CIRCUIT COURT, STATE OF UTAH
COUNTY OF CACHE, LOGAN CITY DEPARTMENT

THE STATE OF UTAH,)
Plaintiff,)
vs.)
DON W. DUNBAR,)
DOB: 12-18-53
Defendant.)

INFORMATION

No. 912004512

The undersigned Jim Mecham, under oath states on information and belief that the above named defendant(s) committed the crimes of:

CRIME:	Driving During Suspension
IN VIOLATION OF:	Section 41-2-136 U.C.A. 1953, as amended.
CLASSIFICATION:	Class C Misdemeanor
AT:	Cache County, State of Utah
ON OR ABOUT:	May 17, 1991

The acts of the defendant(s) constituting the crime(s) were:

That the said Defendant, on the day and place aforesaid, did wilfully and unlawfully drive and operate a motor vehicle upon the highways of this State after his Driver's License had been suspended.

The information is based on evidence obtained from the following witnesses: Jim Mecham

James L. Mecham
COMPLAINANT

Authorized for presentment and filing by the Cache County Attorney:

BY: Patrick B. Nolan

Subscribed and sworn to before me this 31 day of JUNE, 1991.

CIRCUIT COURT JUDGE

05-31-91 Summons Issued.

FILED
JUN 6 AM 11 08
CACHE COUNTY CIRCUIT

IN THE CIRCUIT COURT, STATE OF UTAH
COUNTY OF CACHE, LOGAN CITY DEPARTMENT

THE STATE OF UTAH, Plaintiff, vs. DON W. DUNBAR, Defendant.	S U M M O N S

THE STATE OF UTAH TO THE ABOVE NAMED DEFENDANT(S):

Complaint under oath by Jim Mecham has been made that you committed the crime of:

CRIME:	Driving During Suspension
IN VIOLATION OF:	Section 41-2-136 U.C.A. 1953, as amended.
CLASSIFICATION:	Class C Misdemeanor
AT:	Cache County, State of Utah
ON OR ABOUT:	May 17, 1991

YOU ARE HEREBY SUMMONED to appear before a judge of the Circuit Court at 140 North 1st West, Logan, Utah 9:00 a.m. on the first Tuesday following the service of this summons upon you to answer the charge made against you. If you fail to obey this summons, the court may issue a warrant for your arrest.

Dated: 6/3/91

Circuit Judge

RETURN OF SERVICE

STATE OF UTAH)
:ss.
County of Cache)

I hereby make return of service, and certify:

1. I am a duly qualified and acting peace officer, or am a person over the age of 21 years, and am not a party to this action.

2. I received this Summons on the date of _____, and served it upon the defendant(s) listed below by leaving, at the address(es) and on the date(s) shown below, a copy with the defendant or with a person of suitable age and discretion at the usual place of abode of the defendant, to whom I also showed the original.

3. Upon service the same, I endorsed the date and place of service and my name on the copy served.

Defendant's name and address

Don W. Dunbar
DOB: 12-18-53

Date served:

6/3/91 1600 hrs
Personal Service

(State whether defendant was served personally; if not, include name of person with whom copy was left.)

DATED:

D R Meacham
Deputy Sheriff
(Official Title)

RECEIVED
LOGAN CIRCUIT
'91 JUN 6 AM 9 39